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Supreme Court of The United States

OCTOBER TERM, 1955

No. 330

HARRY A. EATON, JR.
PETITIONER

versus

MRS. NANCY LANKENAU EATON

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF LOUISIANA.

MAURICE R. WOULFE
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COUNSEL FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1955

No.

HARRY A. EATON, JR.
PETITIONER

versus

MRS. NANCY LANKENAU EATON

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA, AND BRIEFS IN SUPPORT THEREOF.

TO THE HONORABLE THE SUPREME COURT
OF THE UNITED STATES:

The petition of Harry A. Eaton, Jr., petitioning from a final decree of the Supreme Court of Louisiana, which affirmed the decree of the Twenty-Second Judicial District Court of the Parish of St. Tammany, State of Louisiana, and which refused to give "full faith and credit" to a decree of divorce rendered by the Chancery Court of Sharpe County, Arkansas, wherein your petitioner obtained a divorce from Mrs. Nancy Lankenau Eaton, after a hearing in which the said Mrs. Eaton made an appearance through Counsel, filed pleadings and accepted the Jurisdiction of the Arkansas Court, by written waiver (Transcript p. 84-85-86).

1.

That petitioner Harry A. Eaton, Jr., and Mrs. Nancy Lankenau, the defendant were married in Newton, Massachussets on September 27, 1935. One child is issue of this marriage, John Alex Eaton, age 17.

2.

That spouses being unable to agree for many years, Harry A. Eaton, Jr., would only visit Louisiana on occasion but spent most of his time on the road and in Hardy, Arkansas, where he had his domicile.

3.

Mrs. Nancy Lankenau Eaton left New Orleans and went to live in California.

4.

Harry A. Eaton, Jr., filed a suit in Sharpe County, Arkansas, on June 24, 1949 and which suit alleged that the parties had been married in 1935, and had lived together as husband and wife until about May, 1948, when the wife abandoned her husband. (Transcript p. 78)

5.

Harry Eaton, Jr., alleged that he was a resident of Arkansas, and that Sharpe County, was his domicile, where the suit was filed.

6.

The suit was filed in the Chancery Court of the Northern District of Sharpe County, Arkansas and bears the number 11037, the title, Harry A. Eaton, Jr., Plaintiff vs. Nancy L. Eaton, defendant. (Transcript p. 78)

7.

Mrs. Nancy L. Eaton, through an Attorney, one Albert C. Boyer, a Notary Public and lawyer for the County of San Diego, California, (where she lived), filed a waiver of summons, a waiver of depositions, and agreed that the case could be submitted to the Court even in vacation, or could be submitted in another County of Arkansas as the convenience of the Court might determine. (Transcript p. 79)

8.

This waiver of summons and waiver of depositions and general appearance through counsel and by written pleadings was filed on behalf of Mrs. Nancy L. Eaton, who signed these pleadings and who was represented in the proceedings by Albert C. Boyer, a lawyer and Notary Public of the County of San Diego, California.

These pleadings were duly filed in the Chancery Court for the Northern District of Sharpe County, Arkansas, and are part of the record on which the Decree of Divorce is based.

9.

The case was taken up on the 23rd of June, 1949 at Hardy, Arkansas, and the testimony of the plaintiff Harry A. Eaton, Jr., (Petitioner) is contained in the transcript herein. (Page 82-83)

10.

The Judgment appears on Page 84-85-86 of the transcript.

11.

The Judgment was rendered on the 27th of June, 1949 and a copy thereof was sent to Mrs. Nancy Lankenau Eaton and, to her attorney, Mr. Albert C. Boyer, at Chula Vista, California.

12.

As a result of this Judgment and as a consequence thereof, it was agreed that the community property existing in Louisiana, belonging to the community of acquets and gains, and which was real estate should be settled in accordance with the laws of Louisiana.

13.

The Judgment of divorce was rendered in Sharpe County, Arkansas, and condemned Harry Eaton, Jr., to pay to the defendant, Mrs. Nancy Lankenau Eaton, $100.00 per month. This was paid for many months.

14.

The Judgment also gave the custody of the child to Harry Eaton, Jr. All of this was agreed to by the wife of Harry Eaton, Jr., Mrs. Nancy Lankenau Eaton.

15.

All of the matters involving the divorce in Sharpe County, Arkansas, were concluded between the parties themselves, and the various attorneys representing them, about July 23, 1949. The community settlement of property, transferring the real estate in Louisiana to Mrs. Nancy Lankenau, was concluded by the recording of this settlement agreement about the 7th of July, 1949, in Jefferson Parish, Louisiana, Conveyance Office Book 270 at page 571.

16.

NOTHING MORE WAS HEARD ABOUT THIS CASE UNTIL MARCH 13, 1951, OR NEARLY TWO YEARS AFTER THE ORIGINAL JUDGMENT IN SHARPE COUNTY, ARKANSAS, HAD BEEN GRANTED.

17.

During the interim of two years, Mrs. Nancy Lankenau Eaton had accepted alimony from her former husband; accepted a community settlement; received real estate and disposed of same and did nothing to question the validity of the Arkansas divorce.

Later in Case Number 11037 of the 22nd Judicial District Court of the Parish of St. Tammany, a suit was filed by Mrs. Nancy Lankenau Eaton to set aside and annul the Arkansas divorce and to declare that Harry Eaton, Jr., petitioner herein, was living in adultery with his present wife.

Later suit for annullment of the Judgment in Arkansas was abandoned by the said Mrs. Nancy Lankenau Eaton and she prayed the Court of St. Tammany Parish, (County) Louisiana, which is the 22nd Judicial District Court of Louisiana to *NOT GIVE FULL FAITH AND CREDIT TO THE ARKANSAS DIVORCE,* although she had filed an appearance therein and had accepted the benefits of that divorce and had been represented by Counsel in those proceedings.

18.

An exception was filed by Petitioner Harry Eaton, Jr., to the jurisdiction of the Louisiana Court on the grounds that the Judgment rendered in the Sharpe County, Arkansas Court, granting a full divorce to Harry Eaton from his wife, Mrs. Nancy Lankenau Eaton, was entitled to "full faith and credit" under the constitution of the United States and particularly Article 4 of the United States Constitution.

19.

This plea to the Court urging the acceptance of the Arkansas divorce, and the giving of said divorce "full faith and credit" as is required by the United States Constitution Article 4, was overruled by the trial Court, which then rendered Judgment in favor of Mrs. Nancy Lankenau Eaton,

granting her a divorce on grounds of adultery, and granting unto her alimony at the rate of $150.00 per month and refusing any recognition whatever to the Arkansas divorce.

REASONS FOR THE ALLOWANCE OF THE WRIT

On this state of facts, there are the following reasons why this application should be granted.

a. The Supreme Court of Louisiana has decided a Federal question of substance in conflict with decisions of the Supreme Court of the United States, as heretofore determined by this Honorable Court, especially interpreting Article 4 of the United States Constitution, and especially in conflict with the cases of *Titus vs. Wallick*, 306 U.S. 282, 287, 59 S. Ct. 557, 560, 83 L. Ed. 655 and the case of *Adam vs. Saenger*, 303 U.S. 59, 62, 58 S. Ct., 454-456 82 L. Ed. 649.

b. The Supreme Court of Louisiana refuses to give "Full faith and credit" to a decree of another Court, namely the Chancery Court of Sharpe County, Arkansas, although both the plaintiff and the defendant were in said Court and both had filed pleadings therein, and had litigated the matter of the divorce in Arkansas, as will be shown by the transcript, particularly pages 78 to 86 inclusive of the said transcript of the record.

c. The Supreme Court of Louisiana in reaching its decision refused to consider that the said Mrs.

Nancy Lankenau Eaton had made an appearance in the Arkansas Court, although she had filed pleadings therein, through an Attorney of her own choice at her home in Chula Vista, California.

The decision of the Supreme Court of Louisiana in this case is directly in conflict with the following cases:

Sherrer vs. Sherrer, 68 Supreme Court, 1087, 334 U. S. 343.
Coe vs. Coe, 334, U. S. 378-68 Supreme Court 1094.
Cook vs. Cook, 72 S. Ct. 157, 342 U. S. 126-159.
Johnson vs. Muelberger, 304 U. S. 581, 587, 71 S. Ct. 474, 477, 95 L. Ed. 552.

The jurisdiction of this case is based upon U. S. C. A. Title 28, Section 1257 Sub-section 3, where the right to have a decision of the Court of Arkansas recognized, and given full faith and credit by the Courts of Louisiana, granting him a divorce, is claimed by the petitioner.

WHEREFORE, Your Petitioner prays that a Writ of Certiorari issue under the seal of this Honorable Court, directing the Supreme Court of Louisiana and commanding that Court to certify and to send to this Court for review a full and complete transcript of the record and all proceedings in that Court, entitled on its docket, Mrs. Nancy Lankenau Eaton vs. Harry A. Eaton, Jr., Number 41,306 of said Court, and that the said decree of the Supreme Court of Louisiana be reversed and rendered, as to the issue of

the Courts of Louisiana, giving full faith and credit to the decree of the Chancery Court of Sharpe County, Arkansas.

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ATTORNEY FOR PETITIONER

RICHARD DOWLING
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OF COUNSEL

CERTIFICATE

I certify that copies, of the foregoing [redacted], have been served upon opposing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.

MAURICE R. WOULFE
CARONDELET BLDG.
NEW ORLEANS, LA.
Attorney for Petitioner

APPENDIX

SUPREME COURT OF LOUISIANA

No. 41,306

MRS. NANCY LANKENAU EATON

v.

HARRY A. EATON, JR.

APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. TAMMANY, STATE OF LOUISIANA; HONORABLE ROBERT D. JONES, JUDGE

DECREE OF THE COURT
RENDERED APRIL 25, 1955
RE-HEARING DENIED MAY 23, 1955
REPORTED 81 SO. 2D-371

HAMITER, Justice.

Alleging that her husband, Harry A. Eaton, Jr., and a certain named paramour have resided in open concubinage since the end of 1948 or the early part of 1949 and are presently so living together in St. Tammany Parish, Mrs. Nancy

Lankenau Eaton instituted this action in the district court of such parish seeking a divorce. Additionally, plaintiff demanded that she be awarded the care and custody of the minor child born of the marriage; that the defendant be condemned to pay her alimony in an amount to be fixed by the court for the support of herself and the child; that he be ordered to pay a reasonable sum as attorney's fees in connection with this proceeding; that an inventory be taken of the property belonging to the community of acquets and gains; and that a partition of said property be decreed.

Defendant, in his answer, denied plaintiff's allegations respecting his living in open concubinage. Affirmatively, he pleaded in bar of the action a decree of divorce rendered in his favor by the Chancery Court of Sharpe County, Arkansas. Further, he specially averred that plaintiff is estopped from prosecuting this suite, she having acquiesced in the divorce proceedings in the State of Arkansas by accepting benefits under the judgment therein rendered.

The district judge, after trial of the merits, refused to give full faith and credit to the Arkansas divorce decree and, accordingly, granted a divorce in favor of plaintiff. Further, he decreed that she have custody of the minor child born of the marriage and that defendant pay to her alimony of $150 per month and attorney's fees in the sum of $500. Plaintiff's demand for a partition of community property was denied, the judge having concluded that she was estopped from claiming any community rights by reason of her previous acceptance of a community settlement.

III

The defendant husband appealed from the judgment. Plaintiff neither appealed nor filed answer to defendant's appeal. In fact, to quote from the brief of her counsel, she "submits that the judgment below, including the alimony award, should be left undisturbed."

Appellant, in this court, urges that (1) the Arkansas decree is entitled to full faith and credit and (2) plaintiff is estopped from questioning such decree, she having received benefits under it, including alimony and a community property settlement.

As is disclosed by the record plaintiff and the defendant were married on September 27, 1935 in Newton, Massachusetts. Of the marriage one child was born, namely John Alex Eaton. In 1939 they moved to Louisiana, establishing a domicile in the Metairie section of Jefferson Parish. There they lived together until November 7, 1948 when Mrs. Eaton went to visit the defendant's sister in Chula Vista, California, the husband purchasing for her trip a one-way ticket. After she had been there about ten days or two weeks she received from Eaton for her signature a paper which she described as "a waiver to appear in court, there was no letter, simply a note clipped to the top saying sign this and have it notarized." Thereupon, by mail, she contacted her husband to find out about the paper, and she learned that he wanted to get a divorce.

Ultimately, Mrs. Eaton consulted an attorney in California, and after certain negotiations were conducted by correspondence between him and Eaton's Louisiana attorney she signed the waiver. This instrument, entitled "Waiver

of Summons and Entry of Appearance" and mailed by her California attorney to Eaton's Arkansas attorney on April 9, 1949, reads in part as follows:

"1. I hereby waive service of summons for the time allowed by law and entry my General Appearance for all purposes, as defendant in the above styled cause.

"2. I hereby waive notice of the taking of depositions for the plaintiff, which includes time, place, all formalities in the taking, transcribing, transmitting and filing of the same, which includes depositions taken by interrogatories, and signatures, but officer's certificate.

"3. I also further agree that this cause may be submitted to the Court in Vacation (at Chambers) in the City of Batesville, Independence County, Arkansas, or at any other place, designated for the convenience of the Court or parties to the Cause, and that final decree may be entered the same as in regular term of the Court.

"4. This instrument is signed with the express understanding that defendant is to receive $100.00 per month, alimony from plaintiff. *PLAINTIFF* to have custody of child of parties."

About the middle of May, 1949 (according to a deposition of Eaton referred to hereafter), the Arkansas divorce suit was filed. In the proceedings Mrs. Eaton never appeared personally or through counsel, and she had no knowledge of the allegations of the petition which were:

"HARRY A. EATON, JR., Plaintiff
VERSUS NO. 11,037
NANCY L. EATON, Defendant

IN THE CHANCERY COURT FOR THE
NORTHERN DISTRICT OF
SHARPE COUNTY, ARKANSAS

* * * *

"The plaintiff for his cause of action against the defendant states and alleges: That he and defendant were married on the 15th [should be 27th] day of September, 1935, and lived together as husband and wife until on the 5th day of May, 1948, at which date left and abandoned plaintiff and continues so to do at this time.

"That one son, John Alex was born of this marriage whose custody has been agreed upon by the parties, and will be submitted to the Court.

"That the plaintiff is a bonafide resident of the Northern District of Sharpe County, Arkansas, and has been such for the time required by law.

"WHEREFORE, Plaintiff prays that he be granted a decree of divorce from defendant, and the care and custody of said child awarded by the Court to the proper party and the agreement made by the parties hereto be approved by the Court and all proper relief.

"HARRY A. EATON, JR.
By: SIDNEY KELLEY
His Attorney."

The record does not disclose the exact date of the filing of such petition, nor does it reveal that the allegations were verified by affidavit of Eaton or of his attorney.

The Arkansas divorce decree was rendered June 27, 1949, it having been predicated on Mrs. Eaton's executed waiver that was mailed to Eaton's Arkansas attorney and on Eaton's deposition in which he stated that he had lived in the Northern District of Sharpe County, Arkansas, for more than two years and that he and his wife had been separated since May 5, 1948. (Under the Arkansas statutes, according to the record, a divorce may be granted "where either party wilfully deserts and absents himself or herself from the other for a space of one (1) year without reasonable cause", and if the plaintiff proves "a residence in the state for three (3) months next before the final judgment granting a divorce in the action and a residence for two (2) months next before the commencement of the action".)

Although answering Mrs. Eaton's allegations, as above shown, Eaton did not appear at the trial of the present cause to testify. In bar of plaintiff's demands herein he relied primarily on the Arkansas divorce decree, including his supporting testimony given by deposition. But with respect thereto the trial court has correctly found and observed as follows: * * * I consider it pertinent to observe that the testimony adduced in this cause by an overwhelming preponderance establishes the fact that the defendant in this case was not a resident of the State of Arkansas prior to the time he received the Arkansas decree. The testimony of Edward K. Elliott, the former husband of Kathleen Heard Elliott, shows that this defendant and Kathleen Heard Elliott were living together as man and wife in Crowley, Lou-

isiana, in July, 1949, and that they moved from the apartment which they were renting at No. 424 North Avenue E, Crowley, Louisiana, on July 31, 1949. The testimony of Mrs. Paul Karre reflects that this defendant and a woman whom he introduced as his wife, rented an apartment from her at No. 424 North Avenue E, Crowley, Louisiana, and that they lived together in said apartment for a period from four to six months, and while she did not remember the exact dates the parties lived in the apartment, she did remember that the person introduced to her by the defendant as Mrs. Eaton gave birth to a child while living in said apartment. A photostatic copy of a birth certificate which has been introduced in evidence and marked for identification as 'plaintiff's Exhibit 6', shows a child was born to Mrs. Harry A. Eaton, Jr. on June 14, 1949, at the Acadia Hospital in Crowley, Louisiana, and the address of the mother is given as No. 424 North E. Street, Crowley, Louisiana. The photostatic copy of the birth certificate further shows that the father of this child was Harry A. Eaton, II, the defendant in this suit. Thus, if, as testified to by Mrs. Karre, the parties lived in her apartment for from four to six months, during which time a child was born, which the birth cetrificate reflects was June 14, 1949, and the testimony of Elliott shows his former wife and Eaton moved out of the apartment July 31, 1949, then Eaton was residing and domiciled in Crowley, Louisiana, during the whole of the three months prior to obtaining the Arkansas decree, which it is shown he was granted on June 27, 1949. I might further add in connection with the defendant's testimony in the Arkansas court, he stated he had resided in Arkansas for a period of two years, which could not possibly have been true, for the reason he did not separate from the present plaintiff until November, 1948, and most assuredly, since the Arkansas law

requires to obtain a divorce on the ground of desertion, the deserter should have been gone for a period of one year, then there could not have been such period of time elapse at the time of the rendition of the Arkansas decree on June 27, 1949, even admitting the present plaintiff deserted the defendant, for the reason that her testimony and that of her father unmistakably shows that she did not go to California until November, 1948. Of course, in line with the other perjured testimony given by this defendant, he stated that this plaintiff deserted him in May, 1948, which of course would have brought him just within the deadline of the one year period for desertion under the Arkansas Statute."

Therefore, since neither party was domiciled in Arkansas during the period required by its statutes, the courts of that state, undoubtedly, were without jurisdiction of the divorce proceeding. But the defendant herein contends that the Louisiana courts cannot question such jurisdiction, and that they must give full faith and credit to the Arkansas decree, in view of plaintiff's having executed the "Waiver of Summons and Entry of Appearance" — a contention that is to be considered and passed upon in the light of certain jurisprudence of the United States Supreme Court.

In the early case of Andrews v. Andrews, 188 U. S. 14, 47 L. Ed. 366 the court concluded that the Full Faith and Credit Clause of the Federal Constitution did not require a state to give recognition to a divorce judgment of a sister state in which no bona fide domicile had been acquired. Its holding was, in other words, that a divorce granted between parties through and by means of the perpetrating of "a fraud upon the law of their domicile by temporarily sojourning

in another state" need not be given full faith and credit in the state of their domicile, even though both appeared before the divorce court in the action.

However, in Sherrer v. Sherrer, 334 U. S. 343, 92 L. Ed. 1429 and Coe v. Coe, 334 U. S. 378, 92 L. Ed. 1451 (companion cases decided at the same term), the court held that where a party left the matrimonial domicile (Mass.) and acquired a residence in another state (Florida in one case, Nevada in the other) for the purpose of obtaining a divorce according to its laws, even though not with the intent to establish a bona fide domicile there, the other spouse could not collaterally attack the jurisdiction of the court granting the divorce. In each of these cases the party suing had fullfilled the residence requirement of the state in which the divorce was obtained, and the decree was valid there. Additionally, the other spouse appeared in person in the proceedings, both by pleadings and by giving testimony. The United States Supreme Court theorized that as such spouse had appeared and participated in the divorce proceedings without availing himself of the opportunity to raise the jurisdictional question the divorce court's finding of jurisdiction was res judicata and entitled to full faith and credit in Massachusetts.

The doctrine of those cases was extended in Johnson v. Muelberger, 340 U. S. 580, 95 L. Ed. 552. There a daughter of a first marriage sought to have her deceased father's third marriage decreed a nullity, she showing that he and his second wife were domiciled in the State of New York when the latter went to Florida and instituted proceedings which culminated in a judgment of divorce. The daughter further showed that the second wife had not resided in

Florida the requisite length of time to vest the court of that state with jurisdiction. However, the husband, *through counsel,* had appeared and answered the petition and had participated in the proceedings. The court held that in view of such appearance and participation by the husband the question of the jurisdiction of the divorce court could not be relitigated. Among other things it stated: "It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been *personally served or who has entered a personal appearance from collaterally attacking the decree.* * * *"

In Cook v. Cook, 342 U. S. 126, 96 L. Ed. 146, 72 S. Ct. 157 there existed a situation somewhat similar to that of the Johnson case. The wife who obtained the assailed divorce had not acquired a residence under the laws of Florida — the state in which it was granted: she received her decree "by deceiving the Florida court as to her domicile." The United States Supreme Court held that the record did not show whether or not the defendant husband had been served in Florida or had appeared in the suit; and, hence, it remanded the case for the purpose of receiving evidence respecting these questions. In so ruling it observed: "* * * If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile * * * *or appeared and admitted her Florida domicile* * * * or was personally served in the divorce state * * *, he would be barred from attacking the decree collaterally; and so would a stranger to the Florida proceedings, such as re-

spondent, unless Florida applies a less strict rule of res judicata to the second husband than it does to the first. * * *

" * * *

"The Florida decree is entitled to that presumption [that there was jurisdiction over the subject matter and persons]. That presumption may of course be overcome by showing, for example, that Nann *never was served in Florida nor made an appearance* in the case either generally or specially *to contest the jurisdictional issues.* * * * " (Brackets and italics ours)

Reverting to the present case, the defendant in the divorce action (plaintiff here) was not served in Arkansas nor did she appear in such action to contest the jurisdictional issues. True, she signed the above quoted, so-called "Waiver of Summons and Entry of Appearance" mailed to her by the husband. But neither she nor her attorney filed it in the divorce proceedings. The executed document was *forwarded to and handled by the husband's Arkansas attorney.* Moreover, he received it even before the commencement of the divorce action. Consequently, it cannot be correctly said that the question of requisite residence, and hence the jurisdiction of the Arkansas court, has been litigated by the parties. Rather, appropriate and correct would be the statement that the proceedings in the Arkansas court, neither party having been properly before that tribunal, is to be viewed merely as a means for providing a "mail-order" divorce.

Since the circumstances outlined above render inapplicable here the doctrines of the Sherrer, Coe, Johnson

and Cook cases (on which defense counsel rely), and it clearly appearing that the Arkansas court lacked jurisdiction of the divorce action in question under its own laws, we conclude and hold, as did the trial judge, that the courts of this state are not required to give full faith and credit to the Arkansas decree pleaded by this defendant.

In this conclusion we are supported by the cases of Brasier v. Brasier (Okla. Sup. Ct.), 200 Pac. 427, Davis v. Davis (Wis. Sup. Ct.), 47 N.W. 2d. 338, and Staedler v. Staedler (N. J. Sup. Ct.), 78 Atl. 2d. 896, in each of which the court held that the divorce decree of a sister state could be attacked collaterally since in the action for the divorce the question of jurisdiction had not been litigated and the defendant had made no personal appearance.

The facts of the Brasier case were practically identical with those of the instant cause, even with respect to the wife's having signed the entry of appearance on which an Arkansas divorce decree was largely predicated. As to such document the Oklahoma court said: "While the record reflects that plaintiff, defendant in the Arkansas proceedings, signed her entry of appearance, it is further revealed that she filed no pleadings in the action, was not represented by counsel, and was not present at the trial when the defendant secured the decree of divorce, and no issue was presented to the Arkansas court relating to the jurisdictional requirement of defendant's domicil there."

In the divorce action involved in the Davis case the wife had entered a "formal special appearance by counsel." The Wisconsin court, after referring to the above quoted excerpt from the opinion of the United States Supreme Court

in the Johnson case, made the following observation: " * * * We know 'general' and 'special' appearances but we have little help from the books in construing 'personal appearance'. We conclude that the court means that the party came into court in his or her own person, as the party had done in the Sherrer and Coe cases, which the court had just referred to. Mrs. Lois Davis did not thus 'personally' appear.

"Under these circumstances we do not consider that the federal constitution nor the decisions interpreting it have called upon Wisconsin to surrender to the courts of another state this remnant of its historic right to determine for itself the marital status of its own residents, and we shall not surrender it until higher authority, speaking on the instant facts or on others which are indistinguishable, requires us to do so."

In the Staedler case the wife, against whom the attacked divorce was granted, had been represented by counsel whose services were arranged for and paid by the husband (the court found that actually he was the husband's agent). The following was said by the New Jersey court: "We are firmly of the opinion that the principles of the Sherrer, supra, and Coe, supra, cases only apply to a true adversary proceeding where the parties are represented by counsel of their independent choice and where there is an opportunity to make a voluntary decision on the question as to whether or not the case should be fully litigated either on the question of jurisdiction or the merits, and that once an election has been made by the defendant under such circumstances and conditions that then and then alone can the judgment of the court be res adjudicata and the full faith

and credit clause operate for the advancement of justice rather than for the perpetration of a fraud."

Appellant urges also, as is pointed out earlier in this opinion, that Mrs. Eaton is estopped from questioning the Arkansas decree. His plea of estoppel is based principally on our decision in Rousse v. Rousse, 219 La. 1065, 55 So. 2d 246. In that case the plaintiff was seeking to be declared the widow of John E. Rousse, deceased, and as such entitled to participate in his estate. The defendant conceded plaintiff's former marriage to Rousse, but she pleaded that it had been dissolved by a Mississippi divorce decree. In affirming the judgment dismissing the suit, we said: " * * * It is admitted that the judgment and decree of divorce obtained in Mississippi could be collaterally attacked on the basis of lack of jurisdiction in the Mississippi Court. However, here we are concerned with the right of this particular plaintiff who, as the facts reveal, having knowledge thereof, acquiesced in the judgment of divorce by remarrying herself and three years thereafter having this marriage revalidated in Church, and then after remaining silent fourteen years longer while her former husband was alive, now urges its invalidity and its nullity.

" * * *

"Under our jurisprudence estoppel is based on a course of action pursued by a person which results to his detriment and prejudice and which he would not have followed had he not been mislead by the actions of another party. On that principle it may well be that as far as the defendant Thelma Stroble Rousse is concerned, estoppel does arise because had it not been for the judgment of divorce obtained

by him from the plaintiff and plaintiff's own subsequent remarriage she probably would never have married John E. Rousse herself.

"But the question involved here is not so much one of estoppel as it is of acquiescence. * * *

" * * *

"The principle upon which cases of this character should be decided is that no one can accept the benefits of a judgment and then be heard to assert its nullity and invalidity. * * * we may well assume that plaintiff's right to attack the judgment of divorce rendered in Mississippi once existed, but having acquiesced in it by remarrying, that being the only authority under which she could have done so, she has lost her right, and her demand must now be refused."

There is nothing in the record of the instant case even suggesting that this plaintiff has acquiesced in the judgment by entering into a second marriage. Nor, incidentally, is it clearly shown by the evidence that any one else has since married Eaton and, hence, has acted on the strength of the Arkansas divorce decree. The Rousse case, therefore, is not controlling here.

Plaintiff's having accepted the so-called alimony payments (defendant paid her $100 per month for a total of only six months) cannot be considered as an act which would estop her from contesting the divorce since her husband, in making such payments, was merely doing what he was obligated to do in view of their marital status and her necessitous circumstances.

Neither does the acceptance of a share of the community, under the circcmstances disclosed by the record, constitute an estoppel as to the attack on the Arkansas divorce decree. The defendant has not shown that he was mislead or injured in any way by such action on the part of the plaintiff. As is pointed out in the Rousse case "estoppel is based on a course of action pursued by a person which results to his detriment and prejudice and which he would not have followed had he not been mislead by the actions of another party." And, as stated in Harvey v. Richard et al., 200 La. 97, 7 So. 2d. 674, "The cases holding that estoppels are not favored by our courts are legion in our jurisprudence. Whenever estoppel is pleaded as an element of a cause of action, it must be pleaded specifically the burden of proving the facts upon which the estoppel is founded, as well as the affirmative showing that he was misled by the acts and forced to act to his prejudice, resting upon the party invoking the doctrine. * * * " See also Arkansas Louisiana Gas Company v. Thompson, 222 La. 868, 64 So. 2d. 202 and Parker et al. v. Ohio Oil Company, 191 La. 896, 186 So. 604. The defendant herein offered no proof whatever in support of his plea of estoppel. (Incidentally, in the settlement, according to the record, plaintiff received two vacant lots of ground. However, because of delinquent installments due on the purchase price she was forced to surrender them to the vendors. And for her equity therein she was paid a total of only $400, a great portion of which she used for expenses in traveling from California to Massachusetts where she subsequently lived for a number of months with Eaton's mother.)

For the reasons assigned the judgment appealed from is affirmed.